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9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA  
12

13 **ONLINE MERCHANTS GUILD,**

2:20-cv-01952-MCE-DB

14 Plaintiff,

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

15 v.

16 **NICOLAS MADUROS, DIRECTOR,  
17 CALIFORNIA DEPARTMENT OF TAX  
& FEE ADMINISTRATION,**

18 Defendant.

Hearing Date: March 25, 2021  
Time: 2:00 p.m.  
Courtroom: 7  
Judge: The Honorable Morrison  
C. England, Jr.  
Trial Date: Not Set  
Action Filed: September 29, 2020

21  
22  
23 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

24 PLEASE TAKE NOTICE THAT, on Thursday, March 25, 2021, at 2:00 p.m., or as  
25 soon thereafter as this matter may be heard, in Courtroom 7 of the Robert T. Matsui  
26 United States Courthouse located at 501 I Street, Sacramento, California, 95814, before  
27 the Honorable Morrison C. England, Jr., Senior United States District Judge of the  
28 United States District Court for the Eastern District of California, defendant Nicolas

1      Maduros, Director of the California Department of Tax and Fee Administration, shall and  
2      hereby does move this Court to dismiss the complaint for lack of subject-matter  
3      jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a  
4      claim upon which relief can be granted pursuant to Rule 12(b)(6).

The basis for this motion is that the Court lacks subject-matter jurisdiction or should not exercise jurisdiction over this case pursuant to (i) the Tax Injunction Act, 28 U.S.C. § 1341, (ii) the principle of comity, and (iii) the principle of abstention.

8        This Motion is supported by the attached Memorandum of Points and Authorities,  
9 defendant's request for judicial notice and such other matters of which this Court may  
10 take judicial notice, all pleadings, records, and papers on file in this action, and upon  
11 such other evidence and oral argument as may be considered by this Court before or at  
12 the hearing on this Motion.

13 || Dated: December 18, 2020

Respectfully Submitted,

XAVIER BECERRA  
Attorney General of California  
MOLLY K. MOSLEY  
Supervising Deputy Attorney General

*/s/ Michael Sapoznikow*

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## INTRODUCTION

Amazon is not only the world's largest online retailer, it is also the world's largest online marketplace facilitator for smaller retailers. Millions of sellers participate in the "Fulfilled by Amazon" (FBA) program that allows them to sell their goods on Amazon.com. Goods sold by FBA merchants are displayed in Amazon.com search results alongside Amazon's own wares, and once purchased, the goods are delivered to customers by Amazon. The FBA arrangement raises the question of who is the "retailer" under state sales and use tax statutes. In 2019, the California Legislature passed a law requiring marketplace facilitators like Amazon to collect and remit sales and use tax, but before 2019, each individual FBA merchant was responsible for remitting the tax.

11 Plaintiff Online Merchants Guild, a trade association for online merchants, asks this  
12 Court to rule that California’s pre-2019 sales and use tax policy violated the United  
13 States Constitution. Plaintiff also contests California’s personal jurisdiction over some  
14 FBA merchants. This Court, however, lacks subject-matter jurisdiction to rule on these  
15 issues. The Tax Injunction Act, 28 U.S.C. § 1341, divests this Court of jurisdiction over  
16 any action that threatens to interfere with the assessment or collection of state taxes,  
17 unless plaintiffs are without a plain, speedy, and efficient remedy in the state courts.  
18 Each of the FBA merchants has a plain, speedy, and efficient remedy: a taxpayer refund  
19 suit in state court. It does not matter that plaintiff’s claims are based on federal law  
20 including the United States Constitution; state courts are well-equipped to handle federal  
21 issues.

22 The principle of comity likewise divests this Court of subject-matter jurisdiction over  
23 any case that might risk disrupting the administration of a state's tax system. And even if  
24 this Court did have jurisdiction to hear this case, it should not: the principle of abstention  
25 counsels against exercising jurisdiction over a matter that may intrude upon a state's  
26 enforcement of its tax laws.

1 Plaintiff's claims belong in state court. Defendant respectfully requests that this  
 2 Court dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules  
 3 of Civil Procedure.

4 **SUMMARY OF PLAINTIFF'S ALLEGATIONS  
5 AND RELEVANT CALIFORNIA LAW**

6 This section is based on plaintiff's complaint and California law.

7 Amazon contracts with millions of FBA merchants, hundreds of whom are  
 8 members of plaintiff Online Merchants Guild. (Complaint ¶¶ 15, 16 and fn. 8.)<sup>1</sup> FBA  
 9 merchants identify and source goods to be sold on Amazon.com. (*Id.* ¶ 16.) For each  
 10 listing, the FBA merchant identifies the product and its sales price, and ships the goods  
 11 to an Amazon warehouse. (*Id.* at ¶¶ 17-18.) Amazon may transfer the goods to other  
 12 Amazon warehouses, and it may break up lots and separate the goods for positioning in  
 13 different locations across the country. (*Ibid.*) Generally, FBA merchants do not control  
 14 where their products are stored by Amazon. (*Id.* ¶ 23.) When a customer places an  
 15 order, Amazon selects the warehouse from which it will draw the product, and Amazon  
 16 packs and ships the product to the customer. (Complaint ¶ 19.) In some circumstances,  
 17 Amazon will fulfill a sale from one FBA merchant's listing using identical goods that were  
 18 provided by a different FBA merchant if doing so lowers costs. (Complaint ¶ 40.)

19 When a customer places an order for an FBA product, Amazon collects payment  
 20 from the customer, credits the FBA merchant's account, and debits Amazon's fees.  
 21 (*Id.* ¶ 19.) Before 2019, Amazon offered FBA merchants a tax calculation service—under  
 22 a separate agreement and for a separate fee—whereby Amazon would calculate and  
 23 collect sales tax reimbursement from customers and forward those amounts to FBA  
 24 merchants. (Complaint Exhibit 4 at p. 5.)<sup>2</sup> But Amazon did not remit the sales tax to the

25 <sup>1</sup> The complaint does not distinguish between Amazon.com, Inc., and its affiliates.

26 <sup>2</sup> The California sales tax is a tax on retailers for the privilege of doing business in  
 the state. Cal. Rev. & Tax. Code § 6051. The taxpayer is the retailer, not the consumer.  
*Loeffler v. Target Corp.*, 58 Cal.4th 1081, 1104 (2014). Retailers must pay sales tax;  
 consumers may be (but are not necessarily) charged "sales tax reimbursement" by  
 retailers to cover the cost of the sales tax. *Id.* at 1103, 1117; Cal. Civ. Code § 1656.1;  
 Cal. Rev. & Tax Code § 6901.5; Cal. Code Regs. tit. 18, § 1700.

1 state. Rather, the FBA merchants were responsible for reporting and remitting sales and  
2 use taxes to state tax authorities. (*Ibid.*)

3       In 2019, California enacted the Marketplace Facilitator Act, which amended the  
4 California Revenue and Taxation Code effective October 1, 2019 to require marketplace  
5 facilitators like Amazon to pay the sales tax on sales that they facilitate. Cal. Rev. & Tax.  
6 Code §§ 6042 and 6043, added by Cal. Stat. 2019, ch. 5, § 2 (AB 147). Amazon is now  
7 paying sales tax pursuant to the Act. (Complaint ¶ 35.) But the Act does not state that it  
8 is retroactive, Cal. Stat. 2019, ch. 5, and the California Department of Tax and Fee  
9 Administration (Department) is continuing to assess and collect state sales and use  
10 taxes from FBA merchants for transactions that took place before the Marketplace  
11 Facilitator Act took effect. (Complaint ¶¶ 35-36.)

12       The Marketplace Facilitator Act altered the standards for jurisdiction over retailers  
13 who make California sales in response to *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080  
14 (2018). Cal. Stat. 2019, ch. 5, §§ 1, 3. After a subsequent amendment, Cal. Stat. 2019,  
15 ch. 34, § 5, California law currently allows the state to exercise jurisdiction over any  
16 retailer that stores inventory in a warehouse or other storage place in the state, Cal. Rev.  
17 & Tax. Code § 6203(c)(1), as well as any retailer that has total combined California sales  
18 exceeding \$500,000, § 6203(c)(4). Plaintiff alleges that the Department takes the  
19 position that FBA merchants use Amazon's California fulfillment center to store their  
20 inventory prior to California sales, and that California therefore has jurisdiction pursuant  
21 to California Revenue and Taxation Code section 6203(c)(1) over every FBA merchant  
22 that makes sales in California, regardless of their total combined California sales in any  
23 calendar year. (Complaint §§ 37-38.)

24       Plaintiff alleges that California violates federal law by (i) continuing to assess and  
25 collect sales and use tax from FBA merchants for transactions that occurred before the  
26 Marketplace Facilitator Act took effect (Complaint, counts 3, 4, 5, 6, 7, 8), and  
27 (ii) exercising jurisdiction over all FBA merchants with California sales, regardless of their  
28 total combined California sales in any calendar year (*id.*, counts 1, 2, 3, 4). Plaintiff also

1 challenges California's "pay first, litigate later" rule (*id.*, count 9; see Cal. Const. art. XIII,  
2 § 32; Cal. Rev. & Tax. Code §§ 6932, 6933) and contends that the tax laws of California  
3 are impermissibly vague (Complaint, count 10).

4 **STANDARD**

5 A motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1)  
6 of the Federal Rules of Civil Procedure may be "facial" if it is based solely on the  
7 complaint, its exhibits, and materials that are judicially noticed, or it may be "factual" if it  
8 is based on evidence outside the pleadings. *Safe Air for Everyone v. Meyer*, 373 F.3d  
9 1035, 1039 (9th Cir. 2004). In this case, defendant's challenge to subject matter  
10 jurisdiction is "facial," and the Court should therefore use a common approach in  
11 resolving defendant's challenges under Rules 12(b)(1) and 12(b)(6): After accepting the  
12 plaintiff's factual allegations as true and drawing all reasonable inferences in the  
13 plaintiff's favor, the court should determine whether the allegations are sufficient as a  
14 matter of law. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). In making this  
15 determination, the plaintiff's legal conclusions are not entitled to an assumption of truth,  
16 nor will mere recitals of the elements of a cause of action, supported only by conclusory  
17 statements, suffice to state a claim on which relief may be granted. *Ashcroft v. Iqbal*, 556  
18 U.S. 662, 678-679 (2009). Moreover, factual allegations in a complaint may only be  
19 considered if they allege a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550  
20 U.S. 544, 569-570 (2007). The plaintiff must allege more than the mere possibility of  
21 misconduct—the complaint must include facts sufficient to cross the line from  
22 conceivable to plausible. *Ibid.*

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## **ARGUMENT**

## I. THE COURT LACKS SUBJECT-MATTER JURISDICTION

#### A. The Court Lacks Jurisdiction Pursuant to the Tax Injunction Act

The Tax Injunction Act divests the district courts of subject-matter jurisdiction over any action that threatens to interfere with the assessment or collection of state taxes, unless plaintiffs are without a plain, speedy, and efficient remedy in the state courts:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

The Tax Injunction Act is intended as “a broad jurisdictional impediment to federal court interference with the administration of state tax systems.” *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 325-326 (5th Cir. 1979) (*quoting Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470 (1976)). The act “has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.” *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). “Its primary purpose is to prevent federal court intrusion into state tax collection, an area which deserves the utmost comity to state law and procedure.” *Jerron West, Inc. v. State of Cal. State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1997).

Despite its title, the Tax Injunction Act is not limited to injunctions. It also bars any declaratory relief, damages, or refunds in state tax matters because those forms of relief may also interfere with the collection of state taxes. *Jerron West*, 129 F.3d at 1338. And there is no exception to the Tax Injunction Act for challenges to state taxes based on the United States Constitution or other federal law. *Ibid.* The *Jerron West* plaintiffs challenged a California sales tax determination based on federal law, including the Fourth and Fifth Amendments to the United States Constitution. *Id.* at 1336. The Ninth Circuit held that the plaintiffs' claims were barred by the Tax Injunction Act, *id.* at 1337-1338, and that the state court was the appropriate forum for the plaintiffs' federal arguments, *id.* at 1339.

1       In this case, plaintiff seeks an injunction, declaratory relief, and damages that  
2 would have the practical effect of stopping the Department from assessing and collecting  
3 taxes from certain FBA merchants. (Complaint, Prayer for Relief items (a), (b), and (d).)  
4 Specifically, plaintiff asks this Court to require the Department to collect sales and use  
5 taxes from Amazon instead of FBA merchants (*id.*, counts 3, 4, 5, 6, 7, 8) and to cease  
6 requiring any FBA merchants with less than \$500,000 in California sales to register,  
7 report, and pay tax on their sales (*id.*, counts 1, 2, 3, 4). If plaintiff achieves its goals, the  
8 Department will no longer be able to assess and collect any sales and use tax from FBA  
9 merchants for sales that occurred before the Marketplace Facilitator Act took effect, and  
10 it will not be able to pursue sales and use tax in the future from FBA merchants with less  
11 than \$500,000 in California sales. These are exactly the kinds of intrusions into state  
12 sales and use tax collection that the Tax Injunction Act was intended to prevent. *Jerron*  
13 *West*, 129 F.3d at 1338.

14       This Court therefore lacks jurisdiction as long as “a plain, speedy and efficient  
15 remedy may be had in the courts of” California. 28 U.S.C. § 1341. The exception for  
16 states that lack a plain, speedy, and efficient remedy must be construed narrowly.  
17 *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982) (“In order to  
18 accommodate these concerns and be faithful to the congressional intent ‘to limit  
19 drastically’ federal-court interference with state tax systems, we must construe narrowly  
20 the ‘plain, speedy and efficient’ exception.”). The Tax Injunction Act only requires that the  
21 state court remedy meet certain “minimal procedural criteria” and not any specific  
22 substantive requirements. *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503, 512-513  
23 (1981). It is sufficient that a state’s courts are “empowered to consider claims that a tax  
24 is unlawful and to issue adequate relief.” *Dillon v. Montana*, 634 F.2d 463, 467 (9th Cir.  
25 1980).

26       California offers a plain, speedy, and efficient remedy: a taxpayer refund suit filed  
27 in one of the California superior courts, following payment of the assessed tax and  
28 exhaustion of administrative remedies. Cal. Rev. & Tax. Code §§ 6901, 6931-6933; Cal.

Code Regs. tit. 18, §§ 35000-35067. A taxpayer may, before paying the tax, petition for redetermination by the Department. Cal. Rev. & Tax. Code § 6561. The Department's decision on a petition for redetermination may be appealed to the Office of Tax Appeals, an independent agency dedicated solely to the adjudication of tax disputes. Cal. Gov. Code §§ 15670-15680. If a taxpayer desires to proceed more quickly to court, they may immediately pay the assessed tax and proceed with an administrative claim for refund, followed by a suit for refund in one of the California superior courts. Cal. Rev. & Tax. Code §§ 6901, 6931-6933. A group of taxpayers may pursue refunds together in a class action. Cal. Rev. & Tax. Code § 6904; *Woosley v. State of California*, 3 Cal.4th 758 (1992).<sup>3</sup>

The United States Supreme Court and the Ninth Circuit have concluded that California's taxpayer refund remedy "is generally a 'plain, speedy and efficient' remedy under" the Tax Injunction Act. *Jerron West*, 129 F.3d at 1339 (discussing sales tax refund procedures) (citing *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 338 (1989) [discussing income tax refund procedures] and *Capitol Indus.-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1113-14 (9th Cir. 1982) [discussing income tax refund procedures].) The courts have specifically approved of California's policy of requiring taxpayers to first pay the tax, and then seek a refund. *Jerron West*, 129 F.3d at 1339; see also *Hibbs v. Winn*, 542 U.S. 88, 103, 107-108 (2004) (Congress intended post-payment refund suits to satisfy the Tax Injunction Act's plain, speedy, and efficient remedy requirement); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. at 523 (same). In a refund action, a California superior court "can review taxpayers' arguments and evidence regarding the allegedly unconstitutional and erroneous tax assessment." *Jerron West*, 129 F.3d at 1339-1340.<sup>4</sup> *Jerron West* is dispositive: the state tax issues raised in plaintiff's complaint cannot be litigated in this Court.

<sup>3</sup> California's taxpayer refund procedures for sales and use taxes are summarized at <https://www.cdtfa.ca.gov/formspubs/pub17.pdf>, <https://www.cdtfa.ca.gov/formspubs/pub117/> and <https://ota.ca.gov/faqs/>.

<sup>4</sup> Jeron West cites three examples of California state court decisions that

1 It is of no import that plaintiff Online Merchants Guild is not a taxpayer and  
2 therefore cannot avail itself of California's taxpayer refund remedy. Cal. Rev. & Tax.  
3 Code § 6937 ("A judgment shall not be rendered in favor of the plaintiff in any action...  
4 brought by or in the name of an assignee of the person paying the amount or by any  
5 person other than the person who paid the amount."). The Tax Injunction Act applies  
6 whenever a state tax *claim* has a plain, speedy, and efficient remedy in state court, but it  
7 does not guarantee every potential *plaintiff* a remedy. *Alcan Aluminum*, 493 U.S. at 338-  
8 339 (California's taxpayer refund procedures constitute a plain, speedy, and efficient  
9 remedy even though only the "actual taxpayer" may seek a refund). In this case, the FBA  
10 merchants, i.e. the taxpayers, have a remedy. Every California sales and use tax  
11 assessment could be the subject of an administrative claim for refund, Cal. Rev. & Tax.  
12 Code § 6901, and then a suit for refund in a California superior court, Cal. Rev. & Tax.  
13 Code § 6933. The fact that the taxpayer must pursue the remedy directly does not  
14 detract from the fact that California offers a remedy for every potential *claim* that the  
15 state has unlawfully assessed sales and use tax. Moreover, refund proceedings that  
16 ostensibly relate only to a single taxpayer may establish influential precedents for other  
17 similarly situated taxpayers. See *California v. Grace Brethren Church*, 457 U. S. at pp.  
18 416-17 ("If the employer ultimately prevails on his constitutional argument, the state  
19 taxing authorities can be expected to respect that court's holding in future administrative  
20 proceedings.")

21 Online Merchants Guild asserts that some retailers are unable to pay the taxes that  
22 have been assessed against them. (Complaint ¶¶ 48-56.) "[I]nability to pay the tax does  
23 not avoid the jurisdictional bar of [28 U.S.C.] § 1341." *Wood v. Sargeant*, 694 F.2d 1159

24 addressed issues arising from the United States Constitution: *Barclays Bank Int'l Ltd. v.*  
25 *Franchise Tax Bd.*, 14 Cal.Rptr.2d 537, 540, 10 Cal.App.4th 1742, 1749 (1992); *Jimmy*  
26 *Swaggart Ministries v. Bd. of Equalization*, 250 Cal.Rptr. 891, 906, 204 Cal.App.3d 1269,  
1291 (1988); and *Duffy v. State Bd. of Equalization*, 199 Cal.Rptr. 886, 889, 152  
Cal.App.3d 1156, 1163 (1984). And in *Alcan Aluminum*, the Supreme Court recognized  
27 that the courts of California are equipped to address constitutional issues. 493 U.S. 340-  
341 (citing *Mercedes-Benz of N. America, Inc. v. State Bd. of Equalization*, 127  
Cal.App.3d 871, 874 (1982), as an example of a California court resolving an issue  
28 arising from the United States Constitution).

1 (9th Cir. 1982) (holding that California's payroll taxpayer refund procedures provide a  
2 plain, speedy and efficient remedy). The right way—and only way—for plaintiff's claims  
3 to be adjudicated is through a taxpayer refund action in a California state court.

4 **B. The Principle of Comity Divests This Court of Jurisdiction**

5 This Court lacks subject-matter jurisdiction for a second reason: the principle of  
6 comity. Congress enacted the Tax Injunction Act based on considerations of comity,  
7 *Jerron West*, 129 F.3d 1334 at 1338, but the principle of comity is older and broader,  
8 *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417, 425-426 (2010). It bars actions in  
9 federal courts when those actions would risk disrupting the administration of a state's tax  
10 system in general—such claims must “proceed originally in state court.” *Ibid.* “More  
11 embracive than the [Tax Injunction Act], the comity doctrine applicable in state taxation  
12 cases restrains federal courts from entertaining claims for relief that risk disrupting state  
13 tax administration.” *Ibid.* Allowing this action to proceed in federal court would  
14 substantially intrude upon and disrupt California's enforcement of its tax system, for the  
15 reasons stated in section I.A above.

16 In *Jerron West*, the Ninth Circuit held that “the principle of comity alone” would bar  
17 the case because granting relief “would intrude upon and disrupt a state's enforcement  
18 of its tax system.” *Jerron West*, 129 F.3d at 1338. Similarly, in *Fair Assessment in Real  
19 Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 113-116 (1981), the United States Supreme  
20 Court held that comity barred an action in federal court where the requested relief would  
21 interfere with the state's tax system. *Fair Assessment* states that restraint is “particularly  
22 appropriate because of the delicate balance between the federal authority and state  
23 governments, and the concomitant respect that should be accorded state tax laws in  
24 federal court.” *Id.* at 108.

25 Comity is a mandatory doctrine that “precludes the exercise of original federal-  
26 court jurisdiction.” *Levin*, 560 U.S. at 426. It differs from the Tax Injunction Act in that it is  
27 a “prudential doctrine” that a state could waive by voluntarily choosing to submit to a  
28

1 federal forum. *Id.* at 432. But California has not voluntarily submitted adjudication of its  
2 sales and use tax to the federal courts. This Court therefore lacks jurisdiction.

3 **II. THIS COURT SHOULD ABSTAIN FROM ADDRESSING COMPLEX STATE TAX LAW  
4 ISSUES WHERE PLAINTIFF HAS NOT FOLLOWED CALIFORNIA'S MANDATORY  
5 PROCEDURES FOR BRINGING SUCH CLAIMS TO COURT**

6 Plaintiff's arguments rely on the assumption that before the Marketplace  
7 Facilitator Act took effect, marketplace facilitators like Amazon could have legally  
8 qualified as "retailers" under California's sales and use tax statutes. The pre-enactment  
9 legal status of marketplace facilitators is a complex question of state sales and use tax  
10 law that this Court should abstain from addressing in the first instance. California has  
11 mandated specific statutory procedures designed to allow the Department and the Office  
12 of Tax Appeals to address such questions in quasi-adjudicative administrative  
13 proceedings in the first instance, subject to judicial review by the superior courts of  
14 California. *Loeffler v. Target Corp*, 58 Cal.4th 1081, 1100, 1103, 1123 (2014). This case  
15 represents an end-run around those procedures. United States Supreme Court  
precedent counsels in favor of abstention in situations like this.

16 The complaint alleges that before the Marketplace Facilitator Act, California  
17 officials disagreed about the appropriate treatment of Amazon in FBA transactions.  
18 (Complaint ¶¶ 26-32.) Specifically, the complaint alleges that the Department's  
19 predecessor, the State Board of Equalization, issued an opinion letter that differed from  
20 the approach advocated by the California Treasurer. (*Ibid.*) The Board of Equalization  
21 opinion letter comprises twelve pages of dense technical analysis and discusses highly  
22 specific details regarding the Amazon corporate entities that perform different FBA  
23 services. (Complaint exhibit 4.)<sup>5</sup>

24 This Court should decline plaintiff's request to second-guess the opinion of an  
25 expert state agency regarding the state statutes that it administers, based on both

26 <sup>5</sup> The Department was established in 2017 and "is the successor to, and is vested  
27 with, all of the duties, powers, and responsibilities of the [Board of Equalization]" with  
respect to sales and use taxes. Cal. Gov. Code § 15570.22, added by Cal. Stat. 2017,  
ch. 16, § 5 (A.B. 102). The Office of Tax Appeals took on the appeal duties that were  
28 previously assigned to the Board of Equalization. Cal. Gov. Code § 15670-15680.

1       *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *R.R. Comm'n v. Pullman Co.*, 312 U.S.  
2       496 (1941). Under *Burford*, 319 U.S. at 332-334, a federal court should abstain from  
3       ruling on an essentially local issue arising out of a complicated state regulatory scheme  
4       where (1) the state has chosen to concentrate suits challenging the actions of the  
5       agency involved in a particular court; (2) federal issues cannot be separated easily from  
6       complex state law issues with respect to which state courts might have special  
7       competence; and (3) federal review might disrupt state efforts to establish a coherent  
8       policy. *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 376-377 (9th Cir.  
9       1982).

10       All of the *Burford* factors support abstention in this case. The California Supreme  
11      Court has declared that the sales and use tax system “is exceedingly closely regulated,  
12      complex, and highly technical[,]” and there is a “comprehensive administrative  
13      scheme . . . provided to resolve these and other tax questions and to govern disputes  
14      between the taxpayer and the Board.” *Loeffler*, 58 Cal.4th at 1103. California has  
15      mandated that all “taxability” issues are committed in the first instance to administrative  
16      adjudication by the Department and the Office of Tax Appeals, and those determinations  
17      are to be reviewed by the superior courts of California. Cal. Rev. & Tax. Code §§ 6901,  
18      6931-6933; Cal. Code Regs. tit. 18, §§ 35000-35067; *Loeffler*, 58 Cal.4th at 1100, 1103,  
19      1123. The complaint alleges that Amazon was the “retailer” in FBA transactions for state  
20      sales and use tax purposes before the Marketplace Facilitator Act took effect. (Complaint  
21      ¶¶ 26-32.) That state-law issue is inextricably bound with plaintiff’s contention that the  
22      Department must direct its tax collection efforts to Amazon rather than individual FBA  
23      merchants. The administrative agencies and courts of California have special  
24      competency in state tax matters and are better situated than this Court to interpret the  
25      term “retailer” and other key terms in the California sales and use tax statutes. See, e.g.  
26      Cal. Rev. & Tax. Code § 6015 (defining “retailer”). If this Court did not abstain, the  
27      precedent would not only have the potential to affect millions of online transactions  
28      involving Amazon and other marketplace facilitators, it could also establish the United

1 States District Courts as a pathway for bypassing the “comprehensive statutory scheme”  
2 for adjudicating tax disputes mandated by California law. *Loeffler*, 58 Cal.4th at 1103.  
3 That could generate a flood of litigation in federal courts as state taxpayers file suit  
4 without following California’s statutory procedures and without paying the assessment  
5 first and filing a claim for refund as required by California law. Cal. Const., art. XIII, § 32;  
6 Cal. Rev. & Tax. Code §§ 6901, 6931-6933.

7       This Court should also abstain based on *Pullman*, which counsels against  
8 unnecessarily deciding constitutional issues. 312 U.S. at 501. Under *Pullman*, *id.* at 500-  
9 501, a federal court may abstain from a case that raises a constitutional issue that might  
10 be mooted or presented in a different posture by a state court determination regarding  
11 state law, where (1) the complaint touches a sensitive area of social policy upon which  
12 the federal courts ought not enter unless no alternative is available, (2) adjudication of  
13 the constitutional issue plainly can be avoided if a definitive ruling on the state issue  
14 would terminate the controversy, and (3) the proper resolution of the state law issue is in  
15 doubt. *Knudsen*, 676 F.2d at 377.

16       *Pullman* abstention is proper here because a state court determination of whether  
17 Amazon was a retailer in FBA transactions before the Marketplace Facilitator Act took  
18 effect could moot plaintiff’s claims. Plaintiff alleges that the status of Amazon in FBA  
19 transactions was a source of public disagreement between California government  
20 officials. (Complaint ¶¶ 26-32.) It is therefore, according to the complaint, a sensitive and  
21 disputed area of social and economic policy. Plaintiff has not identified, and defendant is  
22 not aware of, any California judicial decision that resolves the question of whether  
23 Amazon could have been characterized as a “retailer” in FBA transactions prior to the  
24 Marketplace Facilitator Act. Such a determination could—depending on the result—  
25 render plaintiff’s constitutional claims moot. In particular, if a state court were to hold that  
26 sales and use taxes should have been assessed against Amazon instead of the FBA  
27 retailers, then there would be no reason or need to reach the constitutional issues raised  
28

1 in plaintiff's complaint. As discussed above, the right way to raise this question in the first  
2 instance is through a taxpayer refund action in state court.

3 **CONCLUSION**

4 Defendant respectfully requests that the Court dismiss the complaint without  
5 leave to amend.

6 Dated: December 18, 2020

7 Respectfully Submitted,

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## CERTIFICATE OF SERVICE

Case Name: Online Merchants Guild v. Maduro No. 2:20-cv-01952-MCE-DB

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I hereby certify that on December 18, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 18, 2020, at Sacramento, California.

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K. Vitalie  
Declarant

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*/s/ K. Vitalie*  
Signature

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